

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies	)	
Affecting the Conversion	)	RM 9832
To Digital Television	)	
	)	
Public Interest Obligations of TV	)	MM Docket No. 99-360
Broadcast Licensees	)	
	)	
Children's Television Obligations of	)	MM Docket No. 00-167
Digital Television Broadcasters	)	
	)	
Standardized and Enhanced Disclosure	)	MM Docket No. 00-168
Requirements for Television Broadcast Licensee	)	
Public Interest Obligations	)	

**REPLY COMMENTS OF COMCAST CORPORATION**

Terry Bienstock, Esq.  
Thomas R. Nathan, Esq.  
COMCAST CABLE COMMUNICATIONS, INC.  
1500 Market Street  
Philadelphia, Pennsylvania 19102

Joseph W. Waz, Jr., Esq.  
COMCAST CORPORATION  
1500 Market Street  
Philadelphia, Pennsylvania 19102

James R. Coltharp  
COMCAST CORPORATION  
2001 Pennsylvania Avenue, N.W.  
Suite 500  
Washington, D.C. 20006

Francis M. Buono  
Jonathan A. Friedman  
Stephanie L. Podey  
WILLKIE FARR & GALLAGHER  
1875 K Street, N.W.  
Washington, D.C. 20006-1238

May 21, 2003

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**REPLY COMMENTS OF COMCAST CORPORATION**

Comcast Corporation ("Comcast") hereby replies to comments submitted in the above-captioned proceeding<sup>1</sup> by broadcast interests urging the Commission to adopt digital must-carry requirements for cable operators.<sup>2</sup> The Commission is, of course, considering must-carry issues

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<sup>1</sup> See *In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 18 FCC Rcd. 1279 (rel. Jan. 10, 2003) ("Notice").

<sup>2</sup> See, e.g., Association of Public Television Stations ("APTS") at 18-21; National Association of Broadcasters ("NAB") at 34; Paxson at 7-14; Capitol Broadcasting at 9; National Minority TV at 1-3. Cf. Sharp at 3-4 (favoring government-mandated carriage requirements if market forces do not result in cable carriage of a substantial amount of HDTV broadcast network programming by July 2004).

in its pending digital must-carry rulemaking,<sup>3</sup> and should consider the broadcasters' proposals in that proceeding, not here.<sup>4</sup> However, in the interest of ensuring a fair and balanced record on this issue in the DTV transition docket, Comcast highlights below the principal problems with the broadcasters' proposals.<sup>5</sup>

Comcast and others have provided detailed reasons in the digital must-carry docket as to why the Commission should affirm its previous decisions not to impose dual must-carry or multicast must-carry obligations on cable operators.<sup>6</sup> We have noted that such requirements would be harmful to the consumers we compete to serve, as well as to our cable operations and to our commerce and content businesses. In particular, dual must-carry and multicast must-carry would impede our ability to allocate finite system bandwidth to fashion what we believe to be the most attractive array of services and program packages to existing and potential customers, and would also skew programming purchase decisions by other cable operators, inevitably making it

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<sup>3</sup> See *In the Matter of Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd. 2598 (2001).

<sup>4</sup> In fact, APTS, NAB, and Paxson have made the very same must-carry proposals in the digital must-carry rulemaking that they are raising here. See, e.g., APTS *Ex Parte*, filed in CS Dkt. No. 98-120 (Feb. 27, 2003); Paxson *Ex Parte*, filed in CS Dkt. No. 98-120 (Dec. 23, 2002); NAB *Ex Parte*, filed in CS Dkt. No. 98-120 (Aug. 5, 2002).

<sup>5</sup> The National Cable & Telecommunications Association ("NCTA") and two cable programming networks addressed must-carry issues in their comments, and Comcast supports those comments. See NCTA at 18; A&E at 3-14; Court TV at 3-23.

<sup>6</sup> See, e.g., Comcast Reply Comments, filed in CS Dkt. No. 98-120 (Aug. 16, 2001) ("Comcast Must-Carry Reply Comments"); AT&T Comments, filed in CS Dkt. No. 98-120 (June 11, 2001); AT&T Reply Comments, filed in CS Dkt. No. 98-120 (Aug. 16, 2001); NCTA Comments, filed in CS Dkt. No. 98-120 (June 11, 2001) ("NCTA Must-Carry Comments"); NCTA Reply Comments, filed in CS Dkt. No. 98-120 (Aug. 16, 2001).

more difficult for us to obtain carriage of our programming services.<sup>7</sup> Moreover, dual and multicast must-carry obligations are not supported by the plain language of the Communications Act, and would violate the First and Fifth Amendment rights of cable operators and the First Amendment rights of cable programming networks.<sup>8</sup>

There is no merit to broadcasters' assertions that expanded must-carry requirements are needed to spur the rapid transition to digital television.<sup>9</sup> As an initial matter, neither Congress nor the Supreme Court identified accelerating the DTV transition as a substantial governmental interest to be considered in construing the scope of broadcasters' must-carry rights.<sup>10</sup> Moreover, even if it were permissible for the Commission to base its statutory decision on factors not

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<sup>7</sup> See Comcast Must-Carry Reply Comments at 4-9. See also Court TV at 20 ("A multicast must-carry requirement would subvert the Cable Act's goal of promoting fair competition by giving broadcasters an undeserved preference over cable programmers, who have no such guarantee of carriage."). Cable programming networks spent over \$39 billion between 1997 and 2002 on original programming and program acquisition, and these investments have substantially enhanced the value of cable programming to consumers. See NCTA White Paper, *Cable Pricing, Value and Costs*, at 5-6 (May 2003) (noting that during the last ten years, cable programming network viewing share in all television households increased 105%). Cable programming networks now attract a *majority* of prime-time viewers week after week. See *Basic Continues Roll vs. Broadcast*, Multichannel News, May 6, 2003 ("Basic cable ran its winning streak to nine last week, again outperforming the broadcast networks in key viewership measurements."); Joe Flint, *As Cable Gains in Prime Time, Broadcasters' Cachet Is at Stake*, Wall St. J., May 8, 2003. There can therefore be no legitimate argument that broadcasters deserve expanded must-carry rights because they deliver uniquely important content.

<sup>8</sup> See Comcast Must-Carry Reply Comments at 3-4, 9-10. See also A&E at 7-13 (explaining that a multicast must-carry requirement would be unconstitutional); Court TV at 10-23 (same); NCTA *Ex Parte*, filed in CS Dkt. No. 98-120 (July 9, 2002) (providing analysis of constitutional infirmities of multicast must-carry); Bloomberg *Ex Parte*, filed in CS Dkt. No. 98-120 (June 5, 2002) (detailing statutory arguments against multicast must-carry).

<sup>9</sup> See, e.g., APTS at 17-18; NAB at 34; Paxson at 7-14.

<sup>10</sup> See A&E at 10; Court TV at 13-15.

previously identified by Congress and the Supreme Court, the record evidence provided by cable commenters here and in the digital must-carry docket refutes broadcasters' claims that expanded must-carry requirements are necessary to accelerate the transition.<sup>11</sup> For example, NCTA noted that broadcast HD programming is already being provided to cable customers in more than half of the top 100 television markets where HD is offered.<sup>12</sup> Likewise, Comcast's HDTV service, which typically includes programming from three or more broadcast stations, is now available to more than 9 million Comcast subscribers in 17 markets,<sup>13</sup> and we plan to launch the service in additional markets this year. Comcast also emphasized its continued commitment to negotiating digital carriage agreements with local public television stations. We now offer the digital signals of six leading public television stations to over 6 million Comcast subscribers; we have agreements in place to offer the digital signals of six other public television stations; and we are negotiating carriage agreements in other markets, as well. Other cable operators are making similar progress in carriage of digital public television stations.<sup>14</sup>

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<sup>11</sup> See Comcast Comments, filed in MB Dkt. No. 03-15, at 5-8 (Apr. 21, 2003) ("Comcast DTV Comments"); NCTA at 7-9.

<sup>12</sup> See NCTA at 8 & Att. A (noting that cable systems carry a total of more than 124 different digital television stations in 45 different markets, including at least three network-affiliated stations and a public television station in New York, Los Angeles, Philadelphia, Washington, D.C., Houston, and Orlando).

<sup>13</sup> See Comcast DTV Comments at 5-6. See also Comcast Press Release, *Comcast Reports First Quarter 2003 Results*, at 3 (May 8, 2003) (noting that HDTV is now available to more than 9 million Comcast subscribers). Comcast launched HDTV service in its seventeenth market, Sacramento, on April 28, 2003. See Comcast Press Release, *Comcast Launches HDTV In Sacramento Area* (Apr. 28, 2003).

<sup>14</sup> See NCTA *Ex Parte*, filed in CS Dkt. No. 98-120, at 1 (Mar. 20, 2003) (describing Time Warner, Insight, and Cox carriage agreements with public television stations).

In short, Comcast and other cable operators are not only investing significantly in the digital transition, but also negotiating voluntary agreements with broadcasters for carriage of their digital signals. Cable operators will negotiate more such agreements as (and to the extent that) broadcasters roll out compelling digital programming that cable operators, exercising their editorial judgment,<sup>15</sup> believe will be appealing to viewers.<sup>16</sup> If, as the broadcasters argue, these voluntary negotiations for carriage of network-affiliated stations will not accelerate the DTV transition,<sup>17</sup> it is difficult to see how must-carry, which generally involves carriage of less-watched programming, will do so.<sup>18</sup>

Moreover, expanded must-carry rights would remove any incentive for broadcasters to invest in innovative digital content. As one cable programming network noted, must-carry merely serves to insulate the broadcasters' offerings "from the competitive pressures all other

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<sup>15</sup> See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

<sup>16</sup> As of March 12, 2003, approximately 57% of all commercial television stations (or 679 out of 1,196 stations) are now on the air broadcasting a digital signal. See *In the Matter of Remedial Steps For Failure To Comply With Digital Television Construction Schedule*, 18 FCC Rcd. 7174, ¶ 5 (rel. Apr. 16, 2003). We note that under the Commission's prior requirements, *all* such stations were supposed to have been broadcasting digitally by May 1, 2002. Although commercial broadcasters were the only affected industry participants to have been awarded free use of a valuable public resource (*i.e.*, an additional 6 MHz of spectrum for each licensee), more than two-thirds of them (or 70%), in fact, missed the deadline. See Ted Hearn, *60 TV Stations Better Act Fast*, Multichannel News, Apr. 21, 2003.

<sup>17</sup> See, *e.g.*, APTS at 21. See also *APTS Ex Parte*, filed in CS Dkt. No. 98-120 (Feb. 27, 2003).

<sup>18</sup> See NCTA Must-Carry Comments at 12-13 ("It is far more likely that digital broadcast stations carried pursuant to retransmission consent -- or cable programmers providing digital fare -- would be valued by cable customers than digital must-carry stations.").

programmers face to produce quality programming that piques viewer interest and garners carriage.”<sup>19</sup> Rather, the best way to accelerate the digital transition is to allow competition between digital broadcast and non-broadcast services to drive carriage decisions based on consumer choice and demand. If the Commission properly refrains from granting broadcasters *more expansive* must-carry privileges (no one is proposing to take away broadcasters’ *existing* analog must-carry rights during the transition or their right to must-carry for a primary video digital service post-transition), broadcasters will have an increased incentive to develop high-quality digital programming in order to compete more effectively with non-broadcast programmers. This, in turn, will make their programming more attractive to cable operators and other MVPDs and more likely to motivate consumers to purchase DTV sets.

Finally, contrary to APTS’ suggestion,<sup>20</sup> cable carriage of digital broadcast signals would not be sufficient to satisfy the 85% test under the DTV transition statute.<sup>21</sup> Cable systems serve about 70% of the television households in the United States, so the DTV transition would not end unless an additional 17 million *non-cable* households could receive digital signals on their television sets.<sup>22</sup> Some of these households are served by DBS (which currently carries analog

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<sup>19</sup> A&E at 12. Several commenters raised questions about broadcasters’ level of commitment to HDTV. *See, e.g.*, Thomson at 2 (noting that a significant number of local affiliates are not passing through network-originated HDTV programming in its full resolution); Consumer Electronics Association (“CEA”) at 10-12 (raising concerns about broadcasters’ promotion of HDTV programming). It is difficult to see how expanding broadcasters’ must-carry privileges would improve the situation.

<sup>20</sup> *See* APTS at 19-20.

<sup>21</sup> *See* 47 U.S.C. § 309(j)(14)(b)(iii) (establishing 85% test).

<sup>22</sup> *See* NCTA at 13-14 (citing Nielsen data as of February 2003).

broadcast station signals in select television markets and digital broadcast signals in *no* markets), but many are over-the-air households that have relatively lower incomes than MVPD households and are thus the least likely to invest in new digital television sets or digital converter boxes.<sup>23</sup> And yet, the broadcast industry has nothing to say about possible solutions for delivering digital signals to these over-the-air households.<sup>24</sup> Imposing a digital must-carry requirement on cable operators before addressing the equipment needs of over-the-air viewers would be a classic example of putting the cart before the horse. Cable operators would be forced to donate scarce channel capacity for broadcasters' digital programming (that largely duplicates their analog programming) for an indefinite period of time, while freezing out carriage opportunities for non-broadcast programming, including HDTV services, as well as other services and functions, such as video-on-demand, that cable customers might actually prefer. Comcast submits that such a result would be profoundly anti-consumer.

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<sup>23</sup> See *id.* at 15-16. DBS providers have no current plans to carry local broadcasters' HDTV signals over their systems. See Ted Hearn, *Could HDTV Be Ergen's Achilles Heel?*, Multichannel News, Nov. 25, 2002.

<sup>24</sup> By contrast, CEA urges the Commission to insist that broadcasters promote the use of over-the-air reception devices to receive digital signals, rather than allowing broadcasters to continue to rely on the imposition of federal mandates on others to ensure broadcaster commercial success. See CEA at 11-12.



In sum, the Commission should decline to consider the various digital must-carry proposals raised by broadcasters in this proceeding. To the extent such proposals are considered here or in the Commission's digital must-carry docket, the Commission should affirm its previous determinations on the dual must-carry and multicast must-carry issues.

Respectfully submitted,

Terry Bienstock, Esq.  
Thomas R. Nathan, Esq.  
COMCAST CABLE COMMUNICATIONS, INC.  
1500 Market Street  
Philadelphia, Pennsylvania 19102

Joseph W. Waz, Jr., Esq.  
COMCAST CORPORATION  
1500 Market Street  
Philadelphia, Pennsylvania 19102

James R. Coltharp  
COMCAST CORPORATION  
2001 Pennsylvania Avenue, N.W.  
Suite 500  
Washington, D.C. 20006

/s/ Francis M. Buono  
Francis M. Buono  
Jonathan A. Friedman  
Stephanie L. Podey  
WILLKIE FARR & GALLAGHER  
1875 K Street, N.W.  
Washington, D.C. 20006-1238

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